No. 86-1336

In The

Supreme Court of the United States

October Term, 1986

FRANK McCOY, EDWARD ERDELATZ, and PIERRE MERLE,

Petitioners,

vs.

THE HEARST CORPORATION, a California corporation, SAN FRANCISCO EXAMINER, RAUL RAMIREZ and LOWELL BERGMAN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENTS RAUL RAMIREZ AND LOWELL BERGMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the California Supreme Court correct in its unanimous determination that petitioners failed to introduce clear and convincing evidence of actual malice sufficient to sustain a jury verdict in a public official defamation case?

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CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Article I, Section 2(a) provides:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or **press.**

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STATEMENT OF THE CASE

A. Proceedings in the California Supreme Court

The unanimous opinion of the California Supreme Court decided the following issues:

1. The First Amendment to the United States Constitution and Article 1, section 2 of the California Constitution protected the respondents when they published the articles which formed the basis of this suit. (App. 1).[1]

2. The trial court erred in excluding the testimony of respondent Ramirez about the source of his published statements that petitioner Merle had been the subject of a State Bar disciplinary proceeding. (App. 38-39).

3. The trial court committed error when it instructed the jury on punitive damages under the wrong California statute. (App. 40-42).

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[1]Petitioner's Appendix is designated "App." The Petition is designated "Pet." The Reporter's Transcript of the trial below is designated "R.T." The Clerk's Transcript of the lower court proceedings is designated "C.T."

Several issues briefed and argued before the California Supreme Court were not decided. Involving both state and federal law, these issues were:

1. Whether trial courts have discretion to exclude evidence of the reporters' states of mind in a libel case without violating their constitutional due process right to a fair trial, when the primary factual issue in the case is the reporters' subjective states of mind; or whether the trial court abused its discretion in excluding their state of mind evidence.

2. Whether the trial court denied the respondents a fair trial by admitting evidence that one of the reporters had children out of wedlock, had written for "underground" newspapers, had a "radical" past, possessed "anti-administration" political views, and had been sued for $400 million in an unrelated case involving an article on alleged organized crime figures in California published in *Penthouse* magazine.[2]

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[2]The unrelated libel case against respondent Bergman never went to trial, and thus no court has ever found the *Penthouse* article to be defamatory. President Reagan recently commented on another libel suit arising out of the same article:

> "For example, a magazine article exposing one of the mob's legitimate business fronts referred in passing to longtime La Cosa Nostra member Alameda ((Jimmy) Fratianno as 'an infamous hit man.' A mob lawyer and his La Cosa Nostra superiors ordered Fratianno to file a libel suit, which was eventually dismissed. Years later, facing a long jail term, Fratianno became a Government witness and admitted under oath that he had been directly involved in four mob murders and had incriminating advance knowledge in seven others. Fratianno claims his libel suit had been ordered for

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3. Whether the trial court properly instructed the jury when it declined to instruct on the constitutional principles of freedom of speech and press, and emphasized instead the duty of publishers to investigate the facts under an objective standard.

B. The Record

Petitioners are three public officials—two police inspectors and an assistant district attorney—who filed libel actions against respondent The Hearst Corporation, publisher of respondent *San Francisco Examiner*, and two reporters, respondents Raul Ramirez[3] and Lowell Berg-

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the obvious purposes of raising the cost of hard-hitting reporting about organized crime and deterring journalists and publishers from doing their duty."

R. Reagan, "Declaring War on Organized Crime," *N.Y. Times*, January 12, 1986, § 6 (Magazine) at 27, 65-84.

[3]Raul Ramirez was born in Cuba on September 9, 1946, immigrating to the United States in April 1962 with his family. (R.T. 1934). After receiving a baccalaureate degree in journalism from the University of Florida, Ramirez worked on the staff of the *Miami Herald* for 2-1/2 years as a general assignment reporter. (R.T. 1939-40). When he left the *Miami Herald*, he joined the *Washington Post*, where he was again a general assignment reporter covering, among other things, criminal justice matters. (R.T. 1941). After two years with the *Washington Post*, Ramirez was telephoned by Randolph Hearst and asked to meet with editors of the *San Francisco Examiner*. (R.T. 1947-48). Ramirez joined the *Examiner* staff in July 1974 as a general assignment reporter. (R.T. 1599, 1949). He has covered the San Francisco and San Bruno jails, posing as a guard in those facilities for several weeks (R.T. 1949), and has written a story on Mexican prisons (R.T. 1951). Ramirez has won awards for his work as a journalist, both as a student (R.T. 1935-37) and as a reporter (R.T. 1599, 1949). His excellence as a journalist and

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man.[4] The alleged libel arose from a series of articles in the *Examiner* about the trial of Richard Lee, who was convicted of the murder of a Chinese youth named Poole Leong on July 13, 1972 outside of a housing complex in the Chinatown section of San Francisco. (App. 44-69). The articles were written over a period of eighteen months. During this time, the reporters interviewed 40 people (App. 18-22), including two eyewitnesses to the killing who provided the reporters with affidavits. The first eyewitness, May Tom, a sixteen-year-old girl, stated that she was never certain she had correctly identified the assailant but had been pressured and knowingly misled by the police and prosecutor in the case into identifying Richard Lee as the

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his integrity as an individual were attested to by Larry Jinks, the editor of the *San Jose Mercury News*, and formerly the assistant managing editor of the *Miami Herald* (R.T. 4297-4300), and by Ben Bagdikian, a professor of journalism at the University of California at Berkeley and formerly an assistant managing editor for the *Washington Post* (R.T. 4336-41).

[4]Lowell Bergman, who was 33 years old at the time of trial (R.T. 2699), was a free lance writer from 1973 to 1976, which included the period during which the Richard Lee articles were prepared (R.T. 2538). Bergman graduated from the University of Wisconsin in 1966 with a B.A. degree in history (R.T. 2538), and subsequently attended graduate school for three years at the University of California at San Diego (R.T. 2539). He has worked for the *New York Times*, both as a consultant and as an investigative reporter; he has worked for the *Washington Post;* he has written for *Ramparts magazine;* and he has done investigative work for NBC News. (R.T. 2700). After publication of the Richard Lee articles, and after the filing of this lawsuit, Bergman was employed by ABC Television to be a reporter on ABC's investigative news show "20/20," a position Bergman continued to hold at the time of trial. (R.T. 2701). Bergman, who has won awards in the field of journalism (R.T. 2850-51), was praised as an outstanding, tireless reporter by ABC correspondent David Marsh (R.T. 4316-17).

killer. (R.T. 2251, 2725, 3984; C.T. 82, 83, 104, 105). The second eyewitness, Weyman Tso, was turned over to the police at the Hall of Justice by his attorney. (R.T. 683, 2896, 3182). He was then transferred to the Youth Guidance Center and later released from custody without being interrogated. (R.T. 684-86, 3183). He told respondent Ramirez, and swore in his affidavit, that he had indeed been at the scene of the crime, that he had seen the shooting, and that Richard Lee, whom he knew well, was not present or involved. (R.T. 2178-83; C.T. 109). He also stated that he had attempted to clear Lee's name while detained at the Youth Guidance Center, but that the police were not interested. (C.T. 109). These affidavits were reported in the Lee articles. Petitioners offered no evidence to question the statements made to the reporters by the only eyewitnesses to the crime.

The third affidavit obtained by the reporters was from Thomas Porter, the star prosecution witness at the *Lee* trial. Porter testified that while he and Lee were cellmates during pretrial detention, Lee had confessed to the murder of Poole Leong. Bergman wrote a letter to Porter, then incarcerated in a federal facility in Indiana, to inquire whether Porter would be interested in discussing the case. (App. 13). Within days, Porter telephoned Bergman to say that he had lied at the *Lee* trial in response to threats of violence and promises of leniency from the police and prosecutor, and felt great remorse. (R.T. 1026-27, 1201-02). Porter subsequently executed a detailed affidavit, which was drafted by an Indiana attorney, John Manning, for use in connection with a writ of habeas corpus on Lee's behalf. (R.T. 440-53; C.T. 75-80, Pl. Ex. 61).

Lee's petition for a writ of habeas corpus, supported by the affidavits of the two eyewitnesses and Porter, was filed several days after publication of the articles. The attorney handling the case, a former California trial judge, told respondent Bergman prior to the publication of the articles that in his professional opinion, it was one of the best documented cases for habeas relief that he had ever seen. (App. 34).

The California Attorney General's office contacted Porter in connection with the habeas petition. After a meeting with California officials, Porter repudiated his affidavit and executed a second affidavit asserting that he had testified truthfully in the murder trial. (R.T. 3795). After the trial and intermediate appellate courts had summarily denied his petition for habeas relief, the California Supreme Court granted Lee's petition for hearing and required the Superior Court to hold an evidentiary hearing. (R.T. 4009). The Supreme Court mandated further judicial review, based in part on Porter's first affidavit, although it also had Porter's recanting affidavit at the time it granted relief (App. 33).[5]

The reporters' intensive 18-month investigation was not confined to participants in the *Lee* trial, but included interviews with attorneys, journalists, social workers, police officers, and leaders of and experts on San Francisco's Chinatown community. (App. 18-22). The reporters found substantial evidence which in their minds tended to show that Lee had been wrongfully convicted and that petitioners could have engaged in the misconduct alleged by Porter. (App. 18-21). Near the conclusion of their research, the

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[5]Habeas relief was ultimately denied. (R.T. 4009-10).

reporters attempted to interview all three petitioners to learn their version of the events. Each refused to discuss the Richard Lee case. (R.T. 646-48, 923, 1757, 1766-68, 1850-51, 2246, 3184, 3463-65).

At the close of their investigation, the reporters believed that the evidence they had accumulated raised serious questions about San Francisco's criminal justice system and, particularly, its treatment of members of racial minorities, which should be brought to the public's attention. (R.T. 2273-74, 2688, 2743-45). The articles, questioning the fairness of the *Lee* conviction, were published in the *Examiner* as a three-part series, running from May 19 through 21, 1976. (App. 44-69).

REASONS FOR DENYING THE WRIT

Three aspects of the Petition are noteworthy. First, petitioners omit any discussion or analysis of *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). They make no effort to illustrate the manner in which they believe the California Supreme Court departed from the teachings of *Bose* in its careful review of the evidence of actual malice. They do not explain the actual guidelines or standards to be applied by an appellate court in making its independent review of constitutional facts. Moreover, they leave open the critical question of how review in a case involving First Amendment rights would differ from an ordinary civil appeal. Indeed, petitioners do not appear to acknowledge that Bose, or *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), had any effect upon the standards of appellate review.

Second, no matter what uncertainty petitioners read into the *Bose* opinion, petitioners' principal evidence, the testimony of Thomas Porter, was offered only in the form of deposition and affidavits. This is not a case where a jury had an opportunity to observe Porter and evaluate his demeanor. Porter's deposition testimony was characterized by inconsistency, contradiction and ambiguity. Even under Rule 52(a), Fed. R. Civ. P., when the testimony of witness is so internally inconsistent or inherently impossible that a reasonable fact finder would not credit it, a reviewing court may find error "even in a finding purportedly based on a credibility finding." *Anderson v. Bessemer City,* — U.S. —, 84 L.Ed.2d 518, 529 (1985). In a public official libel case, this Court has ruled that summary judgment in favor of the defense is justified where "the evidence presented in the opposing affidavit is of insufficient caliber or quality to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Anderson v. Liberty Lobby,* — U.S. —, 91 L.Ed.2d 202, 215 (1986). Thus, under any interpretation of *Bose,* the California Supreme Court was correct in reversing the judgment entered in this case.

Third, the jury delivered a general verdict in this case. Contrary to petitioners' suggestion (Pet. 12), it is far from clear that the jury believed Porter and disbelieved Bergman. The jury might well have concluded that the reporters acted with reckless disregard under an erroneous jury instruction that advised the jurors that they could impose liability based on an objective standard of journalistic con-

duct rather than a finding of subjective doubt.[6] A public official libel case decided by jury verdict presents the "strongest case for independent fact finding" by the appellate court. *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. at 518 n.2 (Rhenquist, J., dissenting).

I. THE CALIFORNIA SUPREME COURT DID NOT DISTURB ANY CREDIBILITY CHOICE IN DETERMINING THAT THE RECORD BELOW FAILS TO SUPPORT A CONCLUSION THAT RESPONDENTS ACTED WITH ACTUAL MALICE.

Petitioners have presented a highly selective summary of the record which they contend supports the $4.6 million libel judgment. Culling fragments from the transcript of a six-week trial, which is clearly impermissible under *Bose*, results in an incomplete and distorted picture of the evidence.[7] A more accurate and complete depiction of the trial proceedings is summarized in the California Supreme Court's opinion. (App. 1-2, 10-25). A brief review of the evidence of malice in the trial record, presented below, establishes that the California Supreme Court was correct in concluding, upon an independent review of the constitutional facts in that record, that petitioners below totally failed to establish clear and convincing evidence of actual

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[6]Respondents argued on appeal that the jury instruction defining reckless disregard for the truth erroneously focused on objective conduct rather than subjective belief. This was one of the issues left unresolved by the California Supreme Court.

[7]The California intermediate Court of Appeal, while purporting to follow *Bose*, committed the same error in focusing only on selected portions of the record to sustain the judgment below. App. B.

malice.[8] That decision can be reached and was reached by the California Supreme Court without reassessing legitimate findings regarding the credibility of witnesses.

A. Evidence of Knowing Falsity

Petitioners' case for malice depended on the testimony of Thomas Porter, who testified at the libel trial by deposition. Petitioners focused on a portion of that deposition testimony, claiming throughout the trial and appellate proceedings that it furnished proof that Bergman and Porter had made a bargain whereby Porter would give false affidavit in exchange for assistance from Bergman with Porter's legal situation. (Pet. 11-12). However, as the California Supreme Court concluded, petitioners cannot rely "on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again." (App. 29; emphasis in original). Even looking at the isolated passages stressed by petitioners, without considering the many contradictory portions of Porter's own deposition testimony and Bergman's live testimony, the testimony simply does not establish that any agreement made by Bergman to assist Porter was an arrangement that Porter give false testimony. As the Supreme Court concluded, the testimony at best suggests that Porter heard "leading questions" or "certain suggestions" from Berg-

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[8]Had respondent reporters been able to make a complete trial record documenting their good faith belief in the truth of their articles, the conclusion that respondents failed to act with actual malice would have been even more apparent. The trial court excluded 30 items of evidence relating to the reporters' investigation and conclusions they drew about the Lee prosecution.

man, which led Porter, skilled at manipulation, to believe that Bergman wanted a different story. (R.T. 975, 1215-17, 1377-80). But even the passages of Porter's testimony most helpful to petitioners provide, as the California Supreme Court concluded, "no evidence that Bergman's request that Porter give another story was a request that Porter give *false* testimony, although Porter apparently construed it as such a 'suggestion,' or came as a response to Porter's telling him that he had told the truth at trial." (App. 30).

Moreover, under any interpretation of *Bose* and *New York Times,* petitioners are unjustified in seeking to sustain the jury verdict by mere fragments of Porter's testimony. Porter's deposition testimony, considered in its entirety, is equivocal, internally inconsistent, confused and confusing. Petitioners describe Porter's deposition testimony as though Porter gave a straightforward version of events in direct conflict with Bergman's and that the jury was entitled to choose which witness to believe. But in fact Porter contradicted himself so frequently that no reasonable jury could have found clear and convincing proof of malice from Porter's deposition testimony. Substantial portions of Porter's deposition testimony contradict any implication that he told Bergman that his *Lee* trial testimony was true. It is undisputed that, during Porter's first contact with Bergman, Porter advised Bergman —with no prompting from the reporter—that he had lied at the *Lee* trial and suffered great remorse. (App. 13). In addition, Porter testified that during Bergman's visit to Porter in the Indiana penitentiary, Porter again told Bergman that he had lied at the *Lee* trial and wished to make amends:

Q. And did he [Bergman] come to see you?

A. Yes.

Q. How long did he visit with you?

A. About two, three hours.

Q. Didn't during that visit you also tell him that you lied during the Richard Lee trial?

A. Yes.

Q. You did tell him that, didn't you?

A. Yes.

Q. Okay. Why did you tell him that you lied at the Richard Lee trial?

A. The reason I told him that there is because he indicated that I was—that the whole thing that he had on the Richard Lee trial was false, and then he had mentioned that the San Francisco Police Department do set people up and put them in a position to set another person up and he had heard of it before happening and that he was aware of my five to life.

Q. During this meeting, isn't it true that you were angry at the police department and the D.A.'s office?

A. Yes.

Q. Isn't it also true that you saw this as an opportunity to get back at them?

A. Yes. Mainly to get out of that five to life.

Q. Okay. During that meeting, didn't you say that you had never done anything like this before and it weighs on you?

A. Yes, I think I said that.

Q. And you were referring to your testimony at Richard Lee's trial, right?

A. I think so.

Q. Okay. So the fact that you testified falsely at Richard Lee's trial weighed heavily on you, right?

A. I didn't testify falsely there.

Q. But you told Lowell Bergman that you testified falsely, didn't you?

A. Right.

(R.T. 1029-30).

Thus, Porter contradicted himself on the question of what he had told Bergman during the reporter's first interview. On other points, Porter's deposition testimony is inherently incredible and contradicted by other witnesses, including petitioners themselves.[9]

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[9]For example, Porter testified that he initiated the contact with petitioners by sending out a letter from his jail cell to the police stating that he had information bearing on Lee's guilt (R.T. 1122-27, 1182-83); petitioners testified that they learned that Porter was friendly with Lee from an informant, Lydell Moore, and brought Porter out to question him (R.T. 610-12, 707-12, 805-07, 3163). Porter also testified that Lee told him in jail that he was questioned by the authorities "all that night when he first came in" (R.T. 1058), although petitioners testified that they conducted no interrogation of Lee, who declined to be questioned in the absence of counsel (R.T. 590, 3155).

Nor is Porter's testimony bolstered by Bergman's letters. In context, the letters cited by petitioners support Bergman's testimony, showing that his motivation "is to set the record straight" in the Richard Lee case. (Pl. Ex. 27, 28; App. 17). There is absolutely nothing in the letters suggesting that Bergman wanted a false affidavit from Porter. The most that could be inferred from the letters is that Bergman agreed to assist Porter after Porter had executed an affidavit to right the wrong he had inflicted on Richard Lee by giving perjured testimony for the prosecution in Lee's case. (App. 17-18).

The California Supreme Court was in as good a position as the trial judge and jury to evaluate Bergman's letters and Porter's deposition testimony. Thus, since no judge or jury had an opportunity to view petitioners' star witness, the test of appellate review they apparently seek in this case has never been applied in any reported decision. Under any interpretation of the scope of appellate review established by *Bose,* the California Supreme Court was clearly correct in ruling that Porter's deposition testimony failed to establish clear and convincing proof of malice.

Against Porter's equivocal, inconsistent, and incredible deposition testimony was Bergman's clear and unwavering testimony that Porter telephoned and told him, with no prompting, that he had testified falsely at the *Lee* trial (R.T. 2729-30) and repeated that story when Bergman visited him in Indiana (R.T. 1662, 2746). Petitioners attempt to undermine Bergman's credibility by questioning his opinion of the damage the articles would inflict on petitioners and pointing to an omission in interrogatory answers regarding Porter's telephone calls. These two re-

sponses, culled from hours of cross-examination, hardly constitute substantial impeachment. Petitioners in fact *had* suffered no tangible injury resulting from the articles by the time of trial,[10] and Bergman's recollection that Porter expressed fear of reprisal for his *Lee* trial testimony was substantially consistent in his interrogatory answers and trial testimony.[11]

More fundamentally, petitioners cannot create a case for malice by discrediting Bergman. "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. at 512; *cf. Anderson v. Liberty Lobby*, 91 L.Ed.2d at 217 (plaintiff must affirmatively present evidence of malice to defeat summary judgment in defamation action). Petitioners do not have clear and convincing evidence of knowing falsity in the isolated passages of Porter's deposition testimony. Thus, they would fail even if they could discredit Bergman's clear and unwavering trial testimony.

B. Evidence of Awareness of Probable Falsity

Petitioners' case for reckless disregard of the truth rests primarily on the alleged failure of respondents to

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[10]They had suffered no loss of status, seniority or salary; there had not been even an internal review of the allegations in the articles by their employers. (R.T. 688-90, 837-38, 3199-200, 3491, 3354).

[11]The interrogatory answers briefly identified the major substance of telephone conversations, charting events in Porter's life at the time. Bergman's testimony, that a constant theme of Porter's was fear of retribution if he had to testify while in custody in California, was not inconsistent with the information conveyed in the interrogatory answers. (R.T. 2856, 2871-80).

corroborate Porter's affidavit. (Pet. 12). The duty to corroborate, they contend, stemmed from Porter's unreliability as an inmate and confessed perjurer. The dilemma they face is the inherent contradiction between their case for knowing falsity and their case for reckless disregard: if Porter was so unreliable as to make it nearly conclusive that respondents should not have believed him, then this unreliability infects petitioners' case for malice. Petitioners cannot have it both ways: they cannot argue in the same petition that the California Supreme Court was required to find clear and convincing evidence of malice because Bergman and Ramirez used Porter without sufficient corroboration, and simultaneously argue that the California Supreme Court was required to find clear and convincing evidence of malice from Porter's uncorroborated, unconvincing and contradicted tale of a deal he struck with Bergman. The California Supreme Court correctly exposed this fundamental flaw in petitioners' case:

> Finally, it is noteworthy that respondents [petitioners before this Court] now seek a ruling from this Court that since Porter was a prisoner with something to gain, there were obvious reasons to doubt his credibility and thus any reliance on Porter was reckless. Yet, thrice in the history of these proceedings, respondents [petitioners before this Court] have relied upon statements and stories from Porter: once, to convict Richard Lee; a second time to defeat Lee's habeas corpus claims; and a third time to obtain a multi-million dollar libel judgment. These litigious ironies do not excuse appellants [respondents before this Court] from accountability for recklessness *if* they possess a "high degree of awareness . . . [of] probable falsity." [Citations]. However, they do undermine the strength of respondents' [petitioners before this Court] suggestion that "only a reckless man" could have believed the things Porter had to say. [Citation].
>
> (App. 34).

Both reporters testified that they believed that Porter was telling the truth (R.T. 1722, 2369, 2751), because of risks he was taking by stepping forward and putting his charges in an affidavit (R.T. 2058).[12] Moreover, respondent reporters did find substantial evidence during their 18-month probe, which, in their minds, tended to confirm Porter's allegations. This included accusations by attorneys and journalists that petitioners had engaged in unethical conduct toward witnesses and accused persons in several other criminal cases, evidence of unethical behavior toward Porter, Lee and May Tom in prosecuting the Lee case, and documents establishing the existence of a bargain negotiated between Porter and the authorities in exchange for his testimony.[13] The reporters also learned

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[12]Petitioners' summary of the testimony of Bergman and Ramirez is misleading in suggesting that they doubted Porter's veracity. Bergman's testimony that it was important to find someone who could corroborate Porter was not a statement, or even suggestion, that he doubted Porter; indeed, he denied doubting the truth of the Porter allegations in response to the very next question. (R.T. 2616). In the cited passage, Bergman stated only that if Porter's crime partner could corroborate Porter, she would be an important witness. (*Id.*)

Similarly misleading is the citation to Ramirez's testimony that he did not believe portions of Porter's testimony. Ramirez testified that he found some of the details of the Porter affidavit to reflect the exaggerated recollection of an inmate who was somewhat disorganized in his thinking. (R.T. 1674, 1694-1710, 2570-73, 2611-14, 2745). He did not disbelieve Porter, but thought that he met with the prosecutor numerous times and that making money to pay Sybil's bond meant reducing the amount of bond, which the prosecutor would be able to do. (R.T. 1714-17).

[13]The details on these charges are set out in the California Supreme Court's opinion at App. 18-21. An example is the

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of a strained relationship between the San Francisco Police Department and the Chinatown community, leading to an inability to investigate Chinatown homicides, which in their minds furnished a backdrop against which the Porter story was plausible.[14]

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testimony of May Tom, who told numerous attorneys and writers, and repeated to Ramirez, and placed in a signed affidavit, that she was mistreated by petitioners in the Richard Lee investigation and prosecution. She alleged that in their zeal to convict Richard Lee, they bullied and lied to her; in response to her expressed uncertainty about her identification of Lee, they told her falsely that there were other witnesses against Lee. (C.T. 82-83; R.T. 2104, 2151, 2159, 2254, 2722, 2725, 3984, 4050).

In addition to the evidence in the record, respondent reporters learned of misconduct by petitioners towards another inmate in custody, which respondents were barred from telling the jury. According to respondents' offer of proof, the reporters were told by attorneys that petitioners McCoy and Erdelatz had obtained a confession from an accused person in custody in Louisiana without the presence of his lawyer in violation of an outstanding order and had misrepresented facts in connection with the confession under oath. The confession was ultimately suppressed by a Superior Court judge. The reporters were also told that petitioners McCoy and Erdelatz had been aware that Louisiana authorities were physically abusing the inmate—because they were outside the door when it occurred—did nothing to intercede, but questioned the inmate, who showed physical marks from the abuse, the following day. (R.T. 492-93, 671-82). The exclusion of this state of mind evidence was one of the issues raised on appeal, but not decided by the California Supreme Court.

[14]Some police officers were considered hostile to the Asian community for racial reasons and for a perceived failure to cooperate with police investigations, which could have led to a mounting frustration and eagerness to obtain a conviction at any price in a Chinatown homicide case. The trial court barred the reporters from introducing evidence on this aspect of their investigation. (R.T. 2132, 2138, 2152-53, 2202-06, 2414-17, 2793, 2797). This was one of the issues briefed, but not decided by the California Supreme Court.

Petitioners' claim that the reporters were unable *directly* to corroborate Porter's allegations—and that they therefore should not have published the fact that he had put them into a sworn affidavit—is a contention that the California Supreme Court correctly rejected. Government misconduct of the kind charged by Porter is inherently incapable of objective proof. The reporters learned from high-ranking officials in San Francisco's justice system, including the District Attorney and Undersheriff, that the lack of a paper trail should not be construed as evidence that the Porter allegations were untrue (R.T. 1728, 2147, 4393).[15] Moreover, Porter's accusations involved conduct which could hardly be expected to have witnesses.[16]

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[15]Petitioners stress that the jail records did not document Porter's claim that he was removed from his cell on numerous occasions to meet with petitioners and to obtain treatment for a cyst caused by a blow from petitioner Erdelatz. They point to the testimony of their witness, Frank Heugle, who stated that these absences should have been recorded. (Pet. 7, n.3). However, Heugle's own testimony on cross-examination showed that the jail record system was confused and subject to error. (R.T. 2936-39). Heugle's superior, the Undersheriff of San Francisco, testified on respondents' behalf that he told Ramirez that the jail records were totally unreliable. (R.T. 2147-51, 4393). Moreover, Ramirez had posed as a deputy sheriff in researching an article about the San Francisco jails system, and thus knew from firsthand observation that the record system was subject to error. (R.T. 1949).

This aspect of the case—where the weight of the evidence clearly favored respondents—is a good illustration of the inadequacy of petitioners' case for malice and their presentation of the issue in this petition. Under any interpretation of *Bose*, the California Supreme Court was justified in concluding, after its independent review of the record, that a jury could not find that the lack of an official jail record furnished grounds for finding that the reporters harbored actual doubts about the truth of their articles.

[16]In support of their claim that the California Supreme Court was obligated to uphold the jury verdict, petitioners point to a

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It was well within the California Supreme Court's province to conclude that this absence of direct corroboration of events which would rarely be subject to direct proof could not sustain a finding that the reporters actually doubted the truth of their articles.

The other evidence of "reckless disregard" cited by petitioners again illustrates the mechanical approach to this case which the California Supreme Court correctly rejected. Petitioners present a few incidents which establish, at most, departures from a journalistic ideal.[17] They

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passage of Ramirez's testimony in which "Ramirez also acknowledged that he was never able to confirm the charges of brutality and threats (R.T. 1639:19-22)." (Pet. 13). In context, the transcript shows that Ramirez was asked whether "any individual" confirmed the brutality and threat charge; Ramirez responded that "[a]ccording to his [Porter's] story, it happened in an elevator with only the two police officers present" (R.T. 1993) and that therefore there was no witness who could give direct confirmation of the charges. Of course, the only people who could directly confirm the incident were petitioners, who refused to speak with the reporters about the Lee case prior to publication.

Petitioners continue to stress that the reporters were unable to locate any of the three people to whom Porter said that he told his story. The reporters' vigorous investigation, however, never disproved the existence of these people, and, as the California Supreme Court observed, Porter confirmed the existence of one of them even when he testified by deposition on petitioners' behalf. (App. 35, n.30).

[17]Petitioners cite an incident where the reporters failed to reinterview a witness, and a minor, nondefamatory error printed after publication of the articles which form the basis for the defamation charge. (Pet. 9, n.4, 5).

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do not, even standing alone, furnish evidence from which a jury could reasonably have concluded that the reporters harbored actual doubts about the truth of their publication. In addition, the California Supreme Court was entitled, indeed obligated, to review *all* of the evidence submitted. Having done so, the Court was manifestly correct in its unanimous conclusion that a jury could not reasonably find actual doubt in light of the reporters' 18-month investigation, and the corroboration it produced of the articles' central thesis that the Richard Lee case deserved reexamination by the courts.

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As the California Supreme Court concluded, the reporters' failure to interview an attorney contacted by Richard Lee had no relevance to the defamation charge, as it was undisputed that the attorney had no knowledge of any of the allegedly defamatory accusations made by Porter. (App. 37-38). The reporters testified that they failed to follow up with the attorney because they had contacted him for a limited purpose—to confirm that Lee had sought counsel—close to publication of the articles, and that they believed Lee, who allowed them to interview the lawyer by waiving his attorney-client privilege but advised them that any information the lawyer would have would be irrelevant to the Poole Leong murder. (R.T. 1733, 2685).

The error concerning John Manning's visit to Porter was simply that—a mistake, with a reasonable explanation. Bergman had mailed clippings about Chinatown to John Manning, to inform the Indiana attorney about conditions in San Francisco's Chinatown. Manning showed *those* clippings to Porter during his initial interview with the inmate, who was very interested in them. In a telephone conversation, Manning related this incident to Ramirez, who misunderstood the timing of the visit. The trial court barred Ramirez from explaining to the jury how this error had occurred. (R.T. 1905-07). That ruling is one of the evidentiary rulings that respondents challenged on appeal. Even on the incomplete record, no jury could reasonably find malice from the error, which had no relation to the allegedly defamatory material.

II. THERE IS NO REAL CONFLICT IN THE REPORTED DECISIONS FOLLOWING BOSE CORP. V. CONSUMERS UNION OF U.S., INC.

The question petitioners seek to have this Court review was actually settled by the decisions of this Court reaching their conclusion in *New York Times Co. v. Sullivan* and *Bose Corp. v. Consumers Union of U.S., Inc.* The California Supreme Court devoted several pages of its opinion in its independent review of the whole record. The cases decided after *Bose* applied no different principle.

In the cases cited by petitioners, there was a direct conflict in the testimony of the plaintiffs and the authors of the publication. There was no such direct conflict between witnesses in the present case: Porter's deposition testimony was not in direct conflict with that of respondents. In reaching its verdict, the jury was required to draw inferences from Porter's inconsistencies and to compare those inferences with the remainder of the evidence relating to actual malice. Porter's deposition testimony did not allow this to be a "look them in the eyes" case, as in *Dombey v. Phoenix Newspapers, Inc.*, 159 Ariz. 476, 724 P.2d 562, 576 (1986), or one where the parties directly contradicted each other without any room for dispute as in *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 936 (1985). In this case, the jury was required to draw inferences from testimony with inherent complexities in ap-

plying the constitutional standard. *See Time v. Pape*, 401 U.S. 279, 284-86 (1971).[18]

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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[18]There are other significant distinctions between this case and any cited cases which account for any apparent conflict in applying the principles of *New York Times* and *Bose*. For example, the Virginia Supreme Court applied the actual malice standard only to the issue of punitive damages. *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727 (Va. 1985). The Second Circuit case of *Larmin v. Flynt Dist. Co., Inc.*, 745 F.2d 123, 140-41 (2d Cir. 1984), is completely consistent with the decision of the California Supreme Court because the Second Circuit found insufficient evidence of actual malice to create a jury question.

Petitioners also refer to *Starkins v. Bateman*, 150 Ariz. 537, 72 P.2d 1206 (1986), and *Anderson v. Liberty Lobby, Inc.* to support their contention of a conflict in the reported decisions. *Starkins v. Bateman* was decided by the Court of Appeals of Arizona, an intermediate appellate court. It is not a state court of last resort under this Court's Rule 17.1(b). *Anderson v. Liberty Lobby, Inc.* determined only under what circumstances summary judgment should be denied in defamation cases. It did not make any effort to describe the procedure to be followed by the reviewing court in making its independent review of the whole record after a jury verdict.